Supreme Court, U. S.
FILED
MAY 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; AND ROBERT S. O'BRIEN,
Appellants,
vs.
CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
Appellees.
STATE OF WASHINGTON,
Appellant,
vs.
UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF AMICI CURIAE

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON GAS & ELECTRIC COMPANY, AND DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

IN SUPPORT OF APPELLANTS

Frederick J. Martone
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Amici Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; AND ROBERT S. O'BRIEN,
Appellants,
vs.
CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
Appellees.
STATE OF WASHINGTON,
Appellant,
vs.
UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF AMICI CURIAE

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON GAS & ELECTRIC COMPANY, AND DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

IN SUPPORT OF APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF THE AMICI CURIAE AND INTRODUCTION 2

ARGUMENT 5

I. TO THE EXTENT THAT THE LEGAL INCIDENCE OF A TRIBAL TAX FALLS UPON NONMEMBERS, THE TAX AS APPLIED IS INCONSISTENT WITH THE TRIBE'S DEPENDENT STATUS. 6

II. THE ANALYSIS EMPLOYED BY THE COURT IN *OLIPHANT* PRODUCES THE SAME RESULT IN THE CIVIL CONTEXT. 12

III. ALL OTHER CASES INCLUDING THOSE RELIED ON BELOW IN SUPPORT OF TRIBAL TAXATION ARE INAPPOSITE. 15

IV. WISE PUBLIC POLICY MILITATES AGAINST THE ASSERTION OF TRIBAL CIVIL REGULATORY POWER AND JURISDICTION OVER NONMEMBERS. 22

CONCLUSION 24

CERTIFICATE OF SERVICE 26

APPENDIX 28

TABLE OF AUTHORITIES CITED

Cases	*Page*
Alberty v. United States, 162 U.S. 499, 16 S. Ct. 864 (1896)	13
Avery v. Midland County, 390 U.S. 474, 88 S. Ct. 1114 (1968)	23
Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958)	21, 22
Buster v. Wright, 135 F. 947 (8th Cir. 1905)	19, 20, 21
City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990 (1970)	23
Confederated Tribes of Colville v. State of Washington, 446 F. Supp. 1339 (E.D. Wash. 1978)	5, 17
Ex parte Crow Dog, 109 U.S. 556, 3 S. Ct. 396 (1883)	11
Ex parte Mayfield, 141 U.S. 107, 11 S. Ct. 939 (1891)	13, 14
Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 90 S. Ct. 791 (1970)	23
Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 231 F.2d 89 (8th Cir. 1956)	6, 20, 21
J. Gregory Merrion v. Jicarilla Apache Tribe, Civ. No. 77-292 (D.N.M. Dec. 29, 1977)	5
Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886 (1969)	23
Maxey v. Wright, 54 S.W. 807 (Ct. App. Ind. Terr. 1900)	20
Moe v. Confederated Salish and Kootenai Tribes of Flathead Res., 425 U.S. 463, 96 S. Ct. 1634 (1976)	3

TABLE OF AUTHORITIES CITED

Cases (Continued)	*Page*
Morris v. Hitchcock, 194 U.S. 384, 24 S. Ct. 712 (1904)	17, 18, 19, 20, 21, 22
Nevada v. Hall, 47 U.S.L.W. 4261 [U.S. Mar. 5, 1979]	23
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011 (1978)	5, *passim*
Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362 (1964)	23
Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al., No. CIV. 77-686 (D. Ariz., filed Sept. 1, 1977)	3
Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al., No. 78-3492 (9th Cir., Appellants' Brief Filed April 9, 1979)	3
Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670 (1978)	24
Talton v. Mayes, 163 U.S. 376, 16 S. Ct. 986 (1896)	24
Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe, Civ. No. C77-882M (W.D. Wash. Nov. 3, 1978)	5
United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109 (1886)	7
United States v. Mazurie, 419 U.S. 544, 95 S. Ct. 710 (1975)	16, 17
United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079 (1978)	5, 6, 7, 8, 12, 21, 23, 24
Washington v. Confederated Bands and Tribes, ___ U.S. ___, 99 S. Ct. 740 (1979)	24

TABLE OF AUTHORITIES CITED

Cases (Continued) and *Statutes* — *Page*

Wedding v. Meyler, 192 U.S. 573, 24 S. Ct. 322 (1904) 9

STATUTES

United States Code

18 U.S.C. § 1161 16

25 U.S.C. § 476 17

25 U.S.C. §§ 1301-1303 24

25 U.S.C. § 1302 9

United States Statutes at Large

7 Stat. 450 (1834) (Treaty with the Chickasaw) 13

7 Stat. 478 (1835) (Treaty with the Cherokee) 12

9 Stat. 844 (1846) (Treaty with the Comanche, et al.) 13

9 Stat. 974 (1849) (Treaty with the Navaho) 13

11 Stat. 611 (1855) (Treaty with the Choctaw and Chickasaw) 12

11 Stat. 699 (1856) (Treaty with the Creeks) 12

14 Stat. 755 (1866) (Treaty with the Seminole) 12

14 Stat. 769 (1866) (Treaty with the Choctaw and Chickasaw) 13

14 Stat. 799 (1866) Treaty with the Cherokee) 13

26 Stat. 81 (1890) 13

30 Stat. 495 (1898) (Curtis Act) 17

67 Stat. 586 (1953), 18 U.S.C. § 1161 16

TABLE OF AUTHORITIES CITED

Other Materials — *Page*

1 American Indian Policy Review Commission, *Final Report*, 587 (1977) (Dissenting Views of Cong. Lloyd Meeds) 14

F. Cohen, *Federal Indian Law* (U.N.M. ed. 1942) 13, 15, 22

II C. Kappler, *Laws and Treaties* (1904) 12

S. Rep. No. 1686, 86th Cong., 2d Sess. 2-3 (1960) 14

Transcript of Oral Argument Before the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe* 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; AND ROBERT S. O'BRIEN,
Appellants,
vs.
CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
Appellees.
STATE OF WASHINGTON,
Appellant,
vs.
UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF AMICI CURIAE

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON GAS & ELECTRIC COMPANY, AND DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

IN SUPPORT OF APPELLANTS

INTERESTS OF THE AMICI CURIAE AND INTRODUCTION

The amici curiae[1] are joint tenants in the Navajo Project, a $600,000,000 coal-fired electric generation plant, located near Page, Arizona, on the Navajo Reservation. The amicus Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona. The amicus Department of Water and Power of the City of Los Angeles is a department organized and existing under the charter of the City of Los Angeles, a municipal corporation of the State of California. The amici Arizona Public Service Company and Tucson Gas & Electric Company are public service corporations organized under Arizona law. The amicus Nevada Power Company is a public service corporation organized under Nevada law. Salt River Project owns 21.7% of the Navajo Project for its own benefit and holds 24.3% for the use and benefit of the United States of America intended for use by the Bureau of Reclamation of the Department of the Interior to meet its power needs for the Central Arizona Project. All amici are non-Indian entities. The United States, with the consent of the Navajo Tribe, granted the amici a right-of-way and easement for the project site and related facilities, and the tribe granted the amici an overlapping lease of the same land with the consent of the Secretary of the Interior.

Shortly after the Navajo Project's completion, the Navajo Tribe of Indians adopted resolutions purporting to tax (1) the Project's emission of sulfur compounds, (2) the Project's leasehold, and (3) the Project's gross receipts.

---

[1] This brief is filed with the consent of all the parties to this case pursuant to this Court's Rule 42.

As a result, the amici are parties to litigation in the United States District Court for the District of Arizona challenging the validity of the tax on sulfur emissions.[2] The amount of this tax escalates to about $50,000,000 a year after five years. The amici's challenge to the leasehold interest tax is presently on appeal in the United States Court of Appeals for the Ninth Circuit.[3] Although the amici's claims against the validity of Navajo tribal taxation as to them are many, the dominant and common claim is that the dependent status of Indian tribes necessarily precludes their assertion of governmental authority over nonmember, non-Indian entities.

While the case before this court presents as its major issue the power of the *state* to tax non-Indian entities, there is lurking in the background the issue of tribal taxation of non-Indian entities. Two of the three judges of the district court below apparently held that tribal taxation of non-Indian entities preempted the power of the state to tax those same entities. Circuit Judge Kilkenny, in his separate concurring and dissenting opinion, would have held that even if the tribe could tax non-Indian entities, the state was not preempted from imposing its tax and found this case indistinguishable from *Moe v. Confederated Salish and Kootenai Tribes of Flathead Res.*, 425 U.S. 463, 96 S. Ct. 1634 (1976). Under his view, both the State of Washington and the tribe could tax.

---

[2] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. CIV. 77-686 (D. Ariz., filed Sept. 1, 1977).

[3] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. 78-3492 (9th Cir., Appellants' Brief Filed April 9, 1979).

These amici submit that because the tribe is without power to tax non-Indians, there is neither preemption as found by the district court nor the prospect of dual taxation as inferred by the separate concurring and dissenting opinion. Only the State of Washington can tax non-Indians.

It may be possible for this Court to reverse the judgment of the district court and rule in favor of the State of Washington without deciding the question of the validity of a tribal tax on non-Indians. This is so because it is not clear from the tribal ordinances whether the legal incidence of their taxes falls on non-Indian purchasers or Indian sellers. These amici have no quarrel with tribal taxation of tribal members, be they sellers or purchasers. We do contend that the tribes have no power to impose taxes the legal incidence of which falls on non-Indian purchasers (upon whom the State of Washington imposes its tax) or on non-Indian sellers. But if the issue of tribal power to tax non-Indians is reached or even alluded to in this Court's opinion, it is of crucial significance that the non-Indians upon whom a tribal tax would fall are not parties to this case.

Indeed, the prospect of tribal taxation of non-Indians has greater consequences than the preemption of state law over non-Indians, although the substitution of the power of the tribe (in whose affairs non-Indians may not participate) for the power of the state is itself exceedingly damaging to the federal system. Pending before various federal courts are attempts by tribes to zone non-Indian owned fee patented land

within the boundaries of an Indian reservation,[4] to tax non-Indian utilities and political subdivisions of states,[5] and to tax non-Indian energy producers.[6] If this Court finds that the legal incidence of the tribal taxes in this case falls on non-Indians, the interest of these amici and their millions of non-Indian consumers, as well as the great number of non-Indians who would be affected by the assertion of tribal power over them, is in the reversal of the judgment of the district court on the basis that only the State of Washington may tax non-Indians.

ARGUMENT

The court below found that the tribes were exercising federally delegated powers, which included the power to tax non-Indians. *Confederated Tribes of Colville v. State of Washington*, 446 F. Supp. 1339, 1361 (E.D. Wash. 1978). The court erred in two important respects.[7] We first show that the tribes' power of self-government does not include the power to tax non-Indian nonmembers. We then show that Congress has never delegated this power to the tribes.

---

[4] *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, Civ. No. C77-882M (W.D. Wash. Nov. 3, 1978).

[5] See text accompanying notes 2 and 3 *supra*.

[6] *J. Gregory Merrion v. Jicarilla Apache Tribe*, Civ. No. 77-292 (D.N.M. Dec. 29, 1977).

[7] At the time of the district court's opinion it was without benefit of this Court's opinions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978), and *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978), but when presented with these cases by Appellants' motions for new trial, the court below did not change its ruling. Appendix to Jurisdictional Statement, 77-80.

I.

TO THE EXTENT THAT THE LEGAL INCIDENCE OF A TRIBAL TAX FALLS UPON NONMEMBERS, THE TAX AS APPLIED IS INCONSISTENT WITH THE TRIBE'S DEPENDENT STATUS.

This Court recently resolved the troublesome issues of the source and scope of tribal power. Rejecting the expansive view of tribal self-government advanced by tribal advocates, this Court held that although the source of tribal power was not federal, the theater of its exercise was limited to tribal members, its residuum being insufficient to extend to nonmembers. *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978).

In *Oliphant* a non-Indian was arrested by tribal authorities for violation of the tribe's law and order code. If, as the district court in the case before this Court held, the tribe possessed all governmental power except as expressly withdrawn by the Congress, the tribe had criminal jurisdiction over the non-Indian.[8] In holding that Indian tribes do not have criminal jurisdiction over non-Indians, this Court noted that tribal assertion of power over non-Indians was a new phenomenon and that it was the shared understanding of the lower federal courts, the executive branch, and the Congress that Indian tribes lacked such power. The Court conceded that Indian tribes "do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and

[8] The district court relied upon *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), discussed *infra*. 446 F. Supp. at 1361.

announcing their dependence on the Federal Government," 98 S. Ct. at 1020, but rejected the proposed rule that a tribe's retained powers are such that they are limited only by specific restrictions in treaties or statutes. Instead, the Court held that:

> Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsistent with their status."* *Id.* at 1021 (emphasis in original).

The Court stated that by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. *Id.* Finally, the Court stated that the tribe's assertion of authority over a non-Indian ignored the fact that there exists within the United States but two sovereigns: the United States and the states. *Id.* at 1022, quoting from *United States v. Kagama*, 118 U.S. 375, 379, 6 S. Ct. 1109, 1111, (1886).

Oliphant clearly rejected the assertion that a tribe possesses all powers except those expressly withdrawn by Congress, and held instead that the tribe was also without those powers inconsistent with its dependent status. *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978), emphasizes what is *per se* inconsistent with a tribe's dependent status. At issue in *Wheeler* was whether the double jeopardy clause of the Fifth Amendment bars the federal prosecution of an Indian who has previously been convicted in a tribal court of a lesser included offense. If the source of tribal and federal power were the same, then jeopardy would attach and the subsequent criminal proceeding would be precluded. If, on the other hand, the source of tribal power were different than that of the United States,

the separate sovereignty doctrine would permit the second prosecution. The Court held that the source of tribal power to punish its own members was a part of its residual sovereignty and not a delegated federal power. *Id.* at 1088-89.

But what this Court said in *Wheeler* about the *scope* of tribal power was even more instructive than what it said about its *source*. The Court stated that the power of a tribe to punish its own members was not lost by virtue of its dependent status because

> [t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers of the tribe*. 98 S. Ct. at 1087 (emphasis added).

The Court noted that the limitation with respect to nonmembers rested on the fact that the dependent status of Indian tribes within the territorial jurisdiction of the United States is necessarily inconsistent with their freedom independently to determine their external relations. *Id.* at 1088. But since "the powers of self-government ... involve *only* the relations among members of a tribe ... they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Id.* (emphasis added).

Oliphant and *Wheeler*, read together, produce the following. *Oliphant* instructs us that the tribe's retained powers are not only limited by specific restrictions in treaties or statutes, but also by its dependent status. 98 S. Ct. at 1021. *Wheeler* tells us that the assertion of tribal power over nonmembers is inconsistent with its dependent status because the power of self-government involves only relations among members of the tribe. 98 S. Ct. at 1088.

The district court did not even consider the dependent status of the tribe as a limitation on its power. Had it done so, it would have been unable to limit *Oliphant* in a principled way to criminal jurisdiction. The fundamental question in *Oliphant* was one of jurisdiction. The labels "criminal" and "civil" are the product of our own Anglo-American legal history and do not relate to jurisdiction, the power to act in the first instance. Doctrinally, a lack of criminal jurisdiction by definition means a lack of civil jurisdiction. As stated by Oliver Wendell Holmes in *Wedding v. Meyler*, 192 U.S. 573, 24 S. Ct. 322, 324 (1904), "jurisdiction, whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men." Clearly, if a tribe has no authority to apply its substantive criminal law to a non-Indian and enforce it with the coercive instruments of government, the tribe similarily has no power to apply civil regulatory and taxing authority to a non-Indian and enforce it with the coercive instruments of government. Surely the outcome cannot depend upon a labeling process describing conduct as criminal or in violation of civil regulatory power. Either the entity which purports to assert the power has authority to apply its law to the acts of men or it does not. As to an Indian tribe, *Oliphant* has answered this question.

That this Court would reject the assertion of tribal civil regulatory and taxing power and jurisdiction is clear from the assumptions articulated in its opinion. In rejecting the Suquamish Tribe's argument that a modification in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (guarantees extended from "American Indians" to "any person"), confirmed inherent criminal jurisdiction over non-Indians, the Court said:

the modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians *if* and *where* they come under a tribe's criminal *or civil* jurisdiction by either treaty provision or act of Congress. 98 S. Ct. at 1014 n. 6 (emphasis added).

This reference to civil jurisdiction was no casual dicta. This Court appreciated that its decision in *Oliphant* necessarily precluded tribal civil power over nonmembers as well as criminal jurisdiction, as indicated by the following exchange at oral argument:

> Question: Mr. Ernstoff, is there any way of distinguishing your case from a civil jurisdiction of the Tribe so that the Court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?
>
> Mr. Ernstoff [counsel for the Suquamish Tribe]: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you, I have been trying to do that because I thought it would be of benefit to me to come in with the most narrow case that I can possibly come in with.
>
> *To be intellectually honest, I do not think you really can and I do not think that you should.* Transcript of Oral Argument Before the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe* at 54-55 (emphasis added).

Finally, the Court in *Oliphant* concluded with a profound observation which is as appropriate in the civil context as it is in the criminal context. The Court noted that the former federal policy of immunizing Indian peoples from the criminal jurisdiction of the United States was meant to avoid the unseemliness of judging culturally distinct peoples by standards "made by others and not for them" and of trying them "not

by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." 98 S. Ct. at 1022, quoting from *Ex parte Crow Dog*, 109 U.S. 556, 571, 3 S. Ct. 396, 406 (1883). The Court then said "[t]hese considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedures." *Id.*

If it is wise to immunize reservation Indians from the legal obligations of a dominant culture foreign to their own (the laws of the states), but in whose political affairs they may participate as citizens, then by stronger logic it must also be unwise and surely unjust to subject nonmembers of the tribe to the legal obligations decreed by peoples foreign to them and from whose political affairs they are barred. To subject some racial or ethnic groups to the general lawmaking, taxing, and enforcing power held by another racial or ethnic group is offensive to our fundamental values.[9]

---

[9] Indeed, this Court has fashioned rules which reach a tolerable balance. Just as reservation Indians are immune from state law, so too are non-Indians immune from tribal law. Were it otherwise, the balance would be upset.

II.

THE ANALYSIS EMPLOYED BY THE COURT IN *OLIPHANT* PRODUCES THE SAME RESULT IN THE CIVIL CONTEXT.

Although *Oliphant* and *Wheeler* alone preclude the power to tax, the same conclusion is inevitable from an application of the methodology of *Oliphant*. There, the Court held that because of the treaty-making process, congressional action, the presumptions shared by the Congress, the Executive, and the judiciary, and the overriding sovereignty of the United States, Indian tribes do not have inherent criminal jurisdiction over non-Indians.

With respect to the treaty-making process, the Court examined representative Indian treaties and found that their history was consistent with the principle that Indian tribes could not assume criminal jurisdiction over non-Indians without the consent of Congress. 98 S. Ct. at 1015 n. 8. The Court noted that no Indian treaty expressly granted tribal criminal jurisdiction over non-Indians.

Similarly, no Indian treaty expressly grants tribal civil regulatory authority or jurisdiction over non-Indians. See II C. Kappler, *Laws and Treaties* (1904). On the contrary, we have examined every Indian treaty and have found that *all* treaties which secure the right of self-government to Indian tribes, including *civil* power over persons and property, exclude persons (and their property) who are not by birth, adoption, or otherwise citizens or members of the tribe. Treaty with the Cherokee, art. 5, 7 Stat. 478 (1835); Treaty with the Choctaw and Chickasaw, art. 7, 11 Stat. 611 (1855); Treaty with the Creeks, art. 15, 11 Stat. 699 (1856); Treaty with the Seminole, art. 2, 14 Stat. 755

(1866).[10] *Cf.* Treaty with the Chickasaw, art. III, 7 Stat. 450 (1834); Treaty with the Comanche, et al., art. 2, 9 Stat. 844 (1846); Treaty with the Navaho, arts. VI, IX, 9 Stat. 974 (1849). As to treaties with tribes in the Indian Territory (Oklahoma), *e.g.*, Treaty with the Choctaw and Chickasaw, 14 Stat. 769 (1866), and Treaty with the Cherokee, 14 Stat. 799 (1866), see *Ex parte Mayfield*, 141 U.S. 107, 11 S. Ct. 939, 941 (1891). The scheme in the Indian Territory vested civil jurisdiction in tribal courts over actions in which *only* Indians were parties. Any action to which a nonmember was a party was to be brought in federal court. *Id.* at 941. Act of May 2, 1890, §§ 30, 31, 26 Stat. 81, 94. *Alberty v. United States*, 162 U.S. 499, 503, 16 S. Ct. 864 (1896). *See generally* F. Cohen, *Federal Indian Law* 382 (U.N.M. ed. 1942). There could be no better proof of the shared understanding of the executive and the congressional branches than these treaty and statutory provisions.

As to other congressional action, this Court traced the stages of congressional concern for crimes on the reservation, and concluded that while Congress never expressly prohibited tribal criminal jurisdiction over non-Indians, the absence of such jurisdiction was the underlying principle of congressional action. 98 S. Ct. at 1017-19. The Court noted that the Congress did not initially address itself to the problem of tribal jurisdiction over non-Indians for the reason that there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians in light of the absence of formal tribal judicial systems. *Id.* at 1017.

---

[10] The relevant articles of these four treaties are reproduced in the Appendix to this brief.

For the same reason, Congress has not, except as noted above, addressed itself to the question of tribal civil regulatory power and jurisdiction over non-Indians for the reason that, until very recently, no tribe ever purported to have such jurisdiction. On the few occasions the Senate addressed tribal civil power and jurisdiction in the treaties cited above, it uniformly excluded civil regulatory power and jurisdiction over nonmembers.

The Court in *Oliphant* quoted a 1960 Senate Report which stated that *"Indian tribal law is enforcible against Indians only; not against non-Indians ... [n]on-Indians are not subject to the jurisdiction of Indian courts."* 98 S. Ct. at 1019 (emphasis in original), quoting from S. Rep. No. 1686, 86th Cong., 2d Sess. 2-3 (1960). The Court noted that the three branches of the federal government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians and quoted with approval the dissenting views of Congressman Lloyd Meeds, Vice-Chairman of the American Indian Policy Review Commission, that "such general jurisdiction has generally not been asserted and ... the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." 98 S. Ct. at 1019 n. 15, quoting from 1 American Indian Policy Review Commission, *Final Report,* at 587 (1977) (Dissenting Views of Cong. Lloyd Meeds).

The Court relied on *Ex parte Mayfield,* 141 U.S. 107, 115-16, 11 S. Ct. 939 (1891), for the proposition that congressional action in regulating jurisdiction on Indian reservations demonstrated an intent to forbid tribal jurisdiction over non-Indians. 98 S. Ct. at 1018-19. Yet *Mayfield* was not directed solely to criminal jurisdiction. In describing the jurisdiction of the tribe

and that of the United States the Court said:

> The general object of these statutes is to vest in the courts of the nation [Cherokee Tribe] jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. 11 S. Ct. at 941.

With respect to the assumptions of the Executive Branch, its treaties, cited above, uniformly excluded tribal civil regulatory power and jurisdiction over nonmembers. More recently, Felix S. Cohen, former Assistant Solicitor of the Department of Interior, and author of the major treatise on federal Indian law, acknowledged that the jurisdiction of tribal courts was limited to Indians. F. Cohen, *Federal Indian Law* 148, 382 (U.N.M. ed. 1942). In short, a tribe has no jurisdiction to impose a tax on a nonmember non-Indian.

III.

ALL OTHER CASES INCLUDING THOSE RELIED ON BELOW IN SUPPORT OF TRIBAL TAXATION ARE INAPPOSITE.

The district court relied upon a single case to support tribal taxing power over nonmembers, and tribal advocates have relied on others in different settings. To properly understand those cases, two simple but fundamental distinctions must be drawn.

First, Congress does have the power to delegate its power over Indian affairs to an Indian tribe, where the delegation is not otherwise proscribed by the United States Constitution. Secondly, to the extent an Indian tribe may enjoy an interest in real property, the tribe would possess those nongovernmental powers of a proprietor normally associated with the particular real

property interest. So, for example, where a tribe enjoys a right to possession, whether by treaty, statute, executive order, or lease, the tribe would have the powers associated with a possessor of land. This would include a right to exclude others, a right to sue for trespass damages, and a right to condition entry by contract upon the payment of a fee or other exaction. These proprietary powers belong to any possessor of land in the United States, and are not true governmental powers.

Having made these observations, it is readily demonstrated that reliance on those cases to support tribal taxation of nonmembers is misplaced. The classical delegation case is *United States v. Mazurie*, 419 U.S. 544, 95 S. Ct. 710 (1975). There the Court held that since Congress has the power to regulate the sale of alcoholic beverages in Indian country and Indian tribes are entities with some independent authority over matters that affect the *internal* and social relations of tribal life, Congress could constitutionally delegate its own authority over alcoholic beverages to the tribe. Congress had enacted legislation allowing Indian tribes to regulate the introduction of liquor into Indian country as long as state law was not violated. Act of Aug. 15, 1953, 67 Stat. 586, 18 U.S.C. § 1161. Despite the denial of his application for a tribal liquor license, a non-Indian introduced liquor into Indian country. Accordingly, he was in violation of federal criminal law and subject to federal prosecution, not tribal prosecution, if the congressional delegation to the tribe were valid. While the Court upheld the congressional delegation to the tribe, it specifically stated that "[w]e need not decide whether this independent authority [the tribe's] is itself sufficient for the tribes to impose Ordinance No. 26 [requiring retail liquor

outlets within Indian country, including those on non-Indian land, to obtain a tribal license]." 95 S. Ct. at 718. Hence, far from supporting the assertion of tribal civil regulatory authority over non-Indians, *Mazurie* is a pure congressional delegation case, a principle recognized in *Oliphant* itself. 98 S. Ct. at 1022.

In this case, there is no express congressional delegation of federal power to the tribes upon which a claim to tax nonmember non-Indians can be based. Unlike *Mazurie*, there is no statute authorizing tribes to tax non-Indians. The district court found none, but instead relied upon the Indian Reorganization Act, 25 U.S.C. § 476, as to tribes organized thereunder, and upon the plenary power of Congress as to the others. 446 F. Supp. at 1361. But this Court has already acknowledged that the Indian Reorganization Act does not add to the existing powers of Indian tribes. *Oliphant, supra*, 98 S. Ct. at 1014 n. 6. And while it is true that Congress has plenary power over Indian affairs, it has not exercised that power to permit tribes to tax non-Indians. Plainly, the district court erred in seeking refuge in the delegation doctrine.

The tribe's real property rights are illustrated by *Morris v. Hitchcock*, 194 U.S. 384, 24 S. Ct. 712 (1904). There, non-Indian owners of cattle and other animals sued the Secretary of the Interior and other federal officials seeking to restrain them from removing their cattle from the lands of the Chickasaw Tribe. At issue was the Curtis Act, Act of June 28, 1898, 30 Stat. 495, under which no ordinance or resolution of the Choctaw or Chickasaw tribes affecting the land of the tribe or the rights of any person who had taken an oath of allegiance to the United States should be of any validity until approved by the President of the United States. Under the treaty between the Chickasaw Tribe and

the United States, the tribe had the right to exclude trespassers, and the United States had the duty to protect the tribe from non-Indians who were "not subject to their jurisdiction and laws." 24 S. Ct. at 713-14. The tribe enacted an ordinance imposing a tax on livestock owned by noncitizens of the tribe as part of its "power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain." *Id.* at 714. The ordinance of the tribe was approved by the President of the United States, and the Secretary of the Interior promulgated regulations incorporating the tribal ordinance and authorizing the Department of the Interior to remove livestock upon which the tax was not paid. Hence, the plaintiffs were attacking the power of the Secretary under regulations promulgated pursuant to express congressional authority. The Court upheld the power of the Secretary to remove the livestock on which the tax was not paid. It is to be noted that pursuant to the Secretary's regulations, the tax was to be paid to the United States and not to the tribe. *Id.* at 713.

Hence, *Morris* stands for the proposition that while an Indian tribe cannot subject non-Indians to its jurisdiction and laws, *id.* at 714, it can condition the presence of nonmembers on tribal lands, not as an act of governmental power, but merely as the power of a proprietor of land, and that the enforcement of such conditions must be pursuant to express congressional delegation. It is clear, therefore, that the tribal "tax" in *Morris* was not a tax imposed by the tribe in a governmental capacity, but rather was a trespass fee exacted by the tribe in its capacity as a proprietor of land seeking to impose conditions on entry. Even with respect to this proprietary power, the tribe had no power to enforce but required enforcement by the

United States. Obviously, where the tribe has no possessory interest in the relevant locus (such as land within Indian country not owned by the tribe, land which is owned but leased to others, and land to which conditions of entry have already been attached by contract, right-of-way, or otherwise), the tribe has no proprietary interest upon which a fee or other exaction can be based.

So, in a case as here where a tribe wants to earn income through the sale of tobacco to non-Indians on tribally occupied lands, a tribe may set the price at its choosing. If the non-Indian wants the product, he pays the price. If not, he can purchase elsewhere, just as in *Morris* he could choose to graze his cattle elsewhere. But a tribe cannot tax the non-Indian and enforce it in tribal court or elsewhere.

Cases in the lower federal courts have followed the *Morris v. Hitchcock* governmental/proprietary distinction. In *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), the Creek Tribe imposed a permit tax, approved by the President of the United States, for the privilege it offered noncitizens to trade within the borders of its reservation. The court described the exaction as more of the nature of a license than of a tax. *Id.* at 949. Relying on *Morris*, the court held that the tribe had the authority to require the payment of the tax as a condition precedent to the privilege of trading within the reservation and that the United States had the power to enforce the payment of the tax through the Secretary of the Interior. The court said that the "law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation." *Id.* at 956.

Hence, like *Morris*, *Buster* is a case in which an Indian tribe conditioned the presence of nonmembers on the reservation upon the payment of a license fee or tax. The court perceived the tax to be a federal tax, *id.*, and the United States was the proper party to enforce it. Where the conditions to the presence of nonmembers have already been imposed by lease or right-of-way, further conditions cannot be unilaterally imposed.

In *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Ind. Terr. 1900), non-Indian lawyers brought an action against a United States Indian inspector seeking to enjoin him from collecting an occupation tax imposed by the Creek Tribe. The court upheld the tax, not as an incident of governmental power, but simply as part of the tribe's power to exclude trespassers or condition the presence of nonmembers on their reservation. Indeed, the court cited an opinion of the Attorney General which likened a similar tax to the right of a hotel keeper to prescribe rules and charges for persons who become his fellow occupants. *Id.* at 809. The enforcing authority was the United States, not the tribe, and the only remedy was the removal of the lawyer from the reservation as a trespasser. *Id.* at 812. Hence, it is clear that the Court of Appeals of the Indian Territory viewed the tax not as an act of government, but merely as a condition imposed by a landowner on one who had no right to be present on the land.

Two other cases from the United States Court of Appeals for the Eighth Circuit missed the governmental/proprietary distinction of *Morris*, but their holdings have been repudiated by the rule of *Oliphant*. 98 S. Ct. at 1021. In *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F. 2d 89 (8th Cir. 1956), relied upon by the court below, a reservation Indian brought

an action against his tribe in federal court seeking to enjoin the imposition of a tribal tax on his non-Indian lessee. Relying on *Buster* and *Morris*, the court upheld the power to tax. The court held that the tribal power to tax was not pretermitted by any federal statute and, therefore, still existed. Obviously, the court was in error for at least two reasons.

Its reliance on *Buster* and *Morris* was wholly misplaced. As shown above, *Buster* and *Morris* were cases of express congressional delegation and federal enforcement, and the "tax" was upheld as a proprietor's trespass fee, not an act of true governmental power. Neither congressional delegation nor federal enforcement was present in *Iron Crow*.

Secondly, and perhaps more importantly, to the extent that *Iron Crow* upheld tribal power because no federal statute withdrew it, the holding was repudiated by this Court in *Oliphant*. 98 S. Ct. at 1021. As shown above, *Oliphant* and *Wheeler* define the area of sovereignty which has not been divested as encompassing only those relationships between the tribe and its members. A tribal tax on nonmembers is inconsistent with the tribe's dependent status, and therefore cannot withstand the rule of *Oliphant* and *Wheeler*.

The Eighth Circuit showed similar confusion in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958). There, the power to tax was based upon the tribe's proprietary rights in the land, not true governmental powers. The court relied upon *Buster* and *Morris*, both of which were cases involving congressional delegation, federal enforcement, and proprietary powers. Indeed, the tax in *Barta* went to the United States and not the tribe. Moreover, the case was brought by the United States on behalf of the tribe and not by the tribe itself. And, of course, like *Iron*

Crow, to the extent that the court ruled that the tribe had all powers not expressly withdrawn by Congress, *Barta* has been rejected by this Court in *Oliphant*. 98 S. Ct. at 1021.

To summarize, the pre-*Oliphant* cases relating to tribal taxation of nonmembers fall into two groups. *Morris v. Hitchcock* and its progeny merely uphold the tribe's right as a proprietor of land to condition entry, and do not uphold true governmental power. Where the conditions of entry have been established, the tribe is without power to change them. Even Felix S. Cohen acknowledged that *Morris v. Hitchcock* and its descendants were based upon the proprietary power of a tribe to exclude nonmembers, and not tribal self-government. F. Cohen, *Federal Indian Law* 266-67 (U.N.M. ed. 1942). Even as to proprietary powers, congressional delegation and federal enforcement were present.

The other group, the two Eighth Circuit cases, have confused proprietary rights with governmental powers. To the extent they uphold tribal governmental power over nonmembers, the principle upon which they are based has been rejected by *Oliphant*.

IV.

WISE PUBLIC POLICY MILITATES AGAINST THE ASSERTION OF TRIBAL CIVIL REGULATORY POWER AND JURISDICTION OVER NONMEMBERS.

Unlike any other governmental entity in the United States, an Indian tribe is a closed unit. Even a non-Indian owner of fee patented land within the boundaries of an Indian reservation is not and cannot be a member of the tribe. Indeed, to permit such membership would wholly frustrate the purpose of permitting

reservation Indians to make their own rules and be governed by them. As the Court implies in *Oliphant*, 98 S. Ct. at 1022, the exercise of general tribal power over nonmembers raises enormous constitutional problems. There is perhaps no constitutional value more central to our notion of political justice than the principle that subjection to governmental power presupposes the right to participate on an equal basis in the control of that power.[11] Government by consent of the governed is the central theme of American democracy. This Court recently stated that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 47 U.S.L.W. 4261, 4266 [U.S. Mar. 5, 1979]. Non-Indian citizens of the United States have *never* consented to tribal governmental power. Indeed, it is the tribe and its members who have consented to government by the United States. Since tribal members have consented to tribal government, the exercise of extraconstitutional powers by the tribe over them (under *Wheeler)* creates no problem. But non-Indian Americans have consented to government *only* under the Constitution. The exercise of extraconstitutional powers by the tribe over them within the borders of the United States violates the social contract.

---

[11] This central principle finds expression in the "one person, one vote" cases which hold that any general purpose governmental entity must allow equal franchise to all persons. *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S. Ct. 1990 (1970); *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 90 S. Ct. 791 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886 (1969); *Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114 (1968); *Cf. Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).

This Court recognized that the exercise of tribal power over nonmembers would be an "unwarranted intrusion on their personal liberty," and is therefore precluded by the overriding sovereignty of the United States. *Oliphant*, 98 S. Ct. at 1021. The intrusion is enormous since the exercise of tribal power within its proper sphere is not generally constrained by the Bill of Rights,[12] and federal or state jurisdiction does not exist to entertain claims under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1970).[13] Since the tribe's interest in self-government is not a fundamental right, *Washington v. Confederated Bands and Tribes*, __ U.S. __, 99 S.Ct. 740, 761 (1979), any comparison of the interests at stake must result in the conclusion that tribes are without power to tax nonmember non-Indians.

CONCLUSION

This is a case in which the major issue is the power of the state to tax non-Indians who purchase cigarettes on Indian reservations. Tribal power to tax non-Indians arises only in a collateral way and then only if this Court finds that the legal incidence of the tribal tax is on the non-Indian purchaser. Should this Court find that the legal incidence of the tribal tax is not on the non-Indian, then the issue of tribal taxation of non-Indians vanishes.

If, on the other hand, this Court finds that the legal incidence of the tribal tax falls on the non-Indian purchaser, then this case could implicate profoundly more important interests than the simple sale of cigarettes

[12] *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978); *Talton v. Mayes*, 163 U.S. 376, 16 S. Ct. 986 (1896).

[13] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978).

to non-Indians on Indian reservations. Many non-Indians live on Indian reservations and others do business there. The assertion of tribal governmental power over non-Indians can occur and has occurred in manifold ways, each one of which implicates interests of compelling importance, including taxation without representation. If this Court reaches this issue, the Court must find that tribal self-government does not include the power to tax non-Indians.

The judgment of the district court must be reversed for the reason that either the legal incidence of the tribal taxes does not fall on the non-Indian purchaser, or, in the alternative, the power of the State of Washington to tax the non-Indian purchaser is not preempted by tribal taxation for the simple reason that the tribe has no power to tax non-Indian nonmembers.

Respectfully submitted,

Frederick J. Martone

JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Amici Curiae

May, 1979

CERTIFICATE OF SERVICE

I, Frederick J. Martone, one of the attorneys for the amici curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing brief; specifically, that on May 4, 1979, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing brief of amici curiae addressed to each of the following:

The Hon. Wade McCree, Jr.
Solicitor General
Mr. Stephen R. Barnett
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Steven S. Anderson
Ziontz, Pirtle, Morisset,
Ernstoff & Chestnut
Pioneer Building
600 First Avenue
Seattle, Washington 98104

Mr. James B. Hovis
Hovis, Cockrill & Roy
P.O. Box 487
Yakima, Washington 98907

Mr. Richard H. Holmquist
Senior Assistant Attorney General
Department of Revenue
Temple of Justice
Olympia, Washington 98504

Frederick J. Martone

Appendix
TABLE OF CONTENTS

Page

TREATY WITH THE CHOCTAW AND CHICKASAW, 1855 ..... A-1

TREATY WITH THE CREEKS, ETC., 1856 .... A-2

TREATY WITH THE SEMINOLE, 1866 ..... A-3

TREATY WITH THE CHEROKEE, 1835 ..... A-4

TREATY WITH THE CHOCTAW AND CHICKASAW, 1855.

* * *

ARTICLE 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; *excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe,* and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, *without becoming citizens or members of either of said tribes.* (emphasis added).

* * *

TREATY WITH THE CREEKS, ETC., 1856

* * *

ARTICLE 15. So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; *excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe;* and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits *without becoming members of either of said tribes.* (emphasis added).

* * *

TREATY WITH THE SEMINOLE, 1866.

* * *

ARTICLE 2. The Seminole Nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, *who may be adopted as citizens or members of said tribe.* (emphasis added).

* * *

TREATY WITH THE CHEROKEE, 1835.

* * *

ARTICLE 5. The United States hereby convenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; *and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.* (emphasis added).

* * *